IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1631

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Petitioners,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Respondents,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The New York State Civil Service Commission, Erasa Poston, former President of the Commission, and Commissioners Scelsi and Stockmeister (hereinafter "the civil service respondents") oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit dated August 6,

1975 (22a-41a).* The Petition only refers to two provisions of the judgment: the reversal of the district court's order mandating, after the administration of a court-approved, validated selection procedure for Correction Sergeant, the appointment of one black or Hispanic Sergeant for every three white appointments until the combined percentage of blacks and Hispanics in the Correction Sergeant title equals the combined percentage of blacks and Hispanics in the next lower Correction Officer title;** and the reversal of the district court's award of fees to plaintiffs' attorneys as private attorneys general.***

Statement of the Case

The Complaint in this action was originally filed on April 10, 1973. The sole violation of law alleged was that defendants' "acts, practices and policies" "relating to the formulation, administration and usage of civil service examination number 34[-]944 and to appointments made or to be made to the rank of Correction Sergeant pursuant to that examination" violate rights secured to plaintiffs and members of the class by 42 U.S.C. §§ 1981 and 1983. Complaint ¶ 25.**** A temporary restraining order was entered upon the filing of the Complaint, a day before the initial appointments from the 34-944 eligible list would have become effective, enjoining defendants from making any permanent appointments from the list and from interfering with the provisional appointments of the named plaintiffs and class members as Correction Sergeants.* Because of the temporary restraining order, the subsequent issuance of a permanent injunction against the use of the examination for any purpose (20a, ¶ 2) and the affirmance of that injunction by the Court of Appeals (28a-31a, 41a ¶ 2), no one has ever obtained a permanent appointment as a result of examination no. 34-944.**

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* References without a prefix refer to the appendix to the Petition.

** See opinion of the Court of Appeals at pp. 33a-39a, 41a ¶ 6, opinion of the district court at pp. 16a-17a and decree of the district court at pp. 20a-21a ¶ 5.

*** See opinion of the Court of Appeals at pp. 40a, 41a ¶ 7 and opinion of the district court at pp. 17a-19a.

**** Plaintiffs alleged that the class consisted of a) black and Hispanic Correction Officers who took examination no. 34-944 but by reason of their performance on that examination were not eligible for or would not be appointed as Correction Sergeants and b) black and Hispanic Correction Officers who were impeded from promotions to Sergeant by written examinations "of the

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nature of" 34-944 or who were deterred from seeking promotion by 34-944 or similar examinations. Complaint ¶ 2(b)(i), (ii). The district court limited the class to "Black and Hispanic Correction Officers or provisional Correction Sergeants who failed 34-944 or who passed but ranked too low to be appointed" (16a), noting that plaintiffs introduced "no evidence as to persons who might have been deterred" from taking the examination by defendants' discriminatory employment practices" (16a n. 14). Plaintiffs did not appeal this ruling.

* Provisional appointments were used to fill Sergeant vacancies during the Spring and Summer of 1972 after the eligible list from a prior Sergeant examination was exhausted and before the 34-944 list was established (2a). Such appointments are authorized by New York Civil Service Law § 65. They are terminable at the will of the appointing authority, vest no rights in the appointee and do not ordinarily extend more than nine months. *Matter of Koso* v. *Green*, 260 N.Y. 491 (1933); *Matter of Rohl* v. *Jeacock*, 259 App. Div. 208 (4th Dep't 1940), aff'd 284 N.Y. 660 (1940); *Russell* v. *Hodges*, 470 F.2d 212 (2d Cir. 1972). The effect of the temporary restraining order was to prefer 10 minority provisionals over 75 white provisionals although all provisionals were appointed under the same circumstances and without regard to the validity of examination no. 34-944 (39a). Of the 10 minority provisionals, 2 refused to accept the benefit of the restraining order and requested demotion to Correction Officer.

** Correction Officers have served and continue to serve provisionally as Correction Sergeants with the approval of the district court. The provisional appointments will continue until the im-

(footnote continued on following page)

The Complaint was amended on June 22, 1973 to allege that Sergeant examinations administered in 1962, 1965 and 1968 were discriminatory and that the "present under-representation" of blacks and Hispanics in the Sergeant title was "primarily" caused by the disparate effects of those examinations. Amendments to Complaint ¶ 17A. The amendments further alleged that the examinations for the entry level position of Correction Officer were discriminatory and that the under-representation of blacks and Hispanics in that title contributed to the alleged under-

(*footnote continued from preceding page*)

plementation of either ¶ 3 of the decree, mandating the administration of a court-approved and validated selection procedure for permanent Sergeant appointments ("final procedure") (20a ¶ 3), or ¶ 4 of the decree, authorizing the use of a court-approved and "unvalidated" selection procedure for permanent Sergeant appointments ("interim procedure") at defendants' option pending the administration of the final procedure (20a ¶ 4). On August 27, 1975, the defendants submitted a proposed final selection procedure and, at the court's request, a proposed interim selection procedure. On January 26, 1976, the district court held the interim procedure should be administered in preference to the final procedure and that the field of candidates should be those individuals who took examination no. 34-944 and were still in the employ of New York State. (The January 26 memorandum of the district court is reproduced at pp. 1a-7a of appendix A to this brief.) On April 19, 1976, the district court entered an order on the memorandum directing the administration of the interim procedure and providing, *inter alia*, for a minority quota of one of every four appointments until the percentage of black and Hispanic Correction Sergeants equals the percentage of black and Hispanic Correction Officers on the date 34-944 was administered. (The April 19 order is reproduced at pp. 8a-10a of appendix B to this brief.) On April 28, 1976, plaintiffs moved to alter or amend the April 19 order to add pre-34-944 seniority for class members who took pre-34-944 Sergeant examinations and who obtained appointments as a result of the interim procedure. That motion is still pending before the district court. The civil service respondents will move shortly before the district court to vacate the interim quota on the authority of *Washington* v. *Davis*, —— U.S. ——, 44 U.S.L.W. 4789 (June 7, 1976). In addition, those respondents will appeal the April 19 order insofar as it directs the interim rather than the final procedure and the use of a quota to obtain minority "parity" between the Sergeant and Officer titles assuming those provisions survive petitioners' motion to alter or amend.

representation of blacks and Hispanics in the Sergeant title.* Amendments to Complaint ¶ 17B. Neither the original Complaint nor the June 1973 amendments alleged intentional discrimination by the state respondents, and both documents avoided any reference to Title VII, 42 U.S.C. § 2000-e *et seq.* (1a, 2a-3a, 40a n. 37).**

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* The Correction Officer series is a closed promotional system, i.e. after entry as a Correctiion Officer, competition for each succeeding title is limited to individuals who have held permanent positions in the next lower title for a period of years which may vary from examination to examination ("time-in-service" requirement). The titles in the series, in ascending order, are Correction Officer, Sergeant, Lieutenant, Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent. Petitioners did not challenge the closed nature of the promotional system or the time-in-service requirements as they existed when 34-944 was administered or at any time prior thereto.

** The district court and the Court of Appeals found an identity between the Fourteenth Amendment standard available to petitioners under 42 U.S.C. §§ 1981 and 1983 and the Title VII standard as elaborated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (2a, 3a-15a, 28a-32a). This Court recently rejected the identity between the two standards in *Washington* v. *Davis, supra* at 4791-92, 4793, 4794 stating that no constitutional cause of action could be stated on the basis of disproportionate impact in the absence of proof of discriminatory purpose. *Chance* v. *Board of Examiners*, 458 F2d 1167 (2d Cir. 1972), the first constitutional employment discrimination case to reach the Second Circuit and the precedent for standards of proof within the Circuit, was expressly disapproved in *Davis, supra* at 4793-94. The district judge herein, following *Chance*, held expressly that the Complaint and amendments did not allege discriminatory purpose and that no such allegation was necessary (2a-3a). The state respondents did not appeal from the district judge's finding that petitioners had stated a cause of action under §§ 1981 and/or 1983 and did not file a cross-petition herein. However, the lower courts' errors in interpreting §§ 1981 and 1983 as allowing a cause of action without a showing of discriminatory purpose are manifest as in *Davis, supra* at 4791, and the judgments below should be vacated. On January 30, 1976, petitioners moved to amend their Complaint to add a Title VII claim. The EEOC charge alleged in support of the claim was filed on June 4, 1975, two months before the Second Circuit opinion and over 3½ years after the last examination for Correction Sergeant. The district court has not yet ruled on the motion.

The material allegations of the Complaint and amendments were traversed in the state respondents' Answer. The defense of lack of standing was affirmatively pleaded in response to the claims against the Officer examinations which petitioners' had necessarily passed to allow them to compete for Correction Sergeant (Answer ¶ Sixty-First), and the defense of statute of limitations and laches was affirmatively pleaded in response to the claims against pre-34-944 Sergeant examinations, the last of which was administered in 1970 (not 1968), more than three years before the commencement of the action. Answer ¶ Sixtieth.* Discovery with respect to the claims set forth in the amendments to the Complaint was also opposed. As a result, the only information in the record from that source with respect to Correction Officers is the percentage of black, Hispanic and white Officers on January 1, 1973 (9.0%, 1.8% and 89.2%, respectively, of a 4,120 man complement) and on May 1, 1973 (8.9%, 2.8% and 88.3%, respectively, of a 4,225 man complement) and brief descriptions of the job from 1956 forward. The only information in the record from discovery with respect to pre-34-944 Correction Sergeant examinations is the percentage of black, Hispanic and white Sergeants on January 1, 1973 (5.1% provisional blacks and 94.1% provisional and permanent whites of a 195 man complement) and on May 1, 1973 (4.6% provisional blacks and 95.4% whites of a 215 man complement),** a "computer display" showing, *inter alia*, the test scores of some candidates on the 1970 Sergeant

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* All pre-34-944 eligible lists had been exhausted or had expired prior to the commencement of the action, and the permanent appointments made from those lists were no longer voidable under state civil service practice.

** The same information was provided for the Lieutenant and Captain titles. The Lieutenant title was .93% black with a 107 man complement in January 1973 and 1% black with a 99 man complement in May 1973. The Captain title was 6.2% black with a 16 man complement in January 1973, and 5.8% black with a 17 man complement in May 1973.

examination (no. 34-007) with an accompanying statement that the display was not reliable because of the large number of "missing" candidates, brief descriptions of the Sergeant job from 1956 forward and a listing of the names of the subtests used on the 1964, 1968 and 1970 Sergeant examinations.* No lists of essential knowledges, skills and abilities were provided for pre-34-944 Sergeant examinations. The district court did not determine whether pre-34-944 materials were appropriate for discovery, and the state respondents' objection on this ground was preserved.**

At the outset of the trial had before the district court from July 23 through July 30, 1973, petitioners withdrew their claims against the Correction Officer examinations and did not otherwise attempt to prove any racially disproportionate effects resulting from those entry level examinations (T. 8).*** The state respondents objected to the use of the computer display for the 1970 Sergeant examination for the purpose of drawing any inferences about the job-relatedness of that examination. The grounds stated in support of the objection were that the time allotted for pre-trial preparation (one month for pre-34-944 material) and for trial (five days was originally allowed) was sufficient only for the defense of 34-944 and that discovery with respect to prior Sergeant examinations had been opposed and remained incomplete (T. 5-6, 14, 97-98). The court was also advised that the 1970

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* Sergeant examinations are divided into subtests with each subtest examining a different aspect of the job.

** See discussion Point A, *infra*, showing that the discovery materials, introduced into evidence at trial, and the testimony were inadequate to establish any minority under-representation between the Sergeant and Officer titles and any past (pre-34-944) discriminatory practice in the Sergeant title.

*** References prefixed by the letter "T" refer to the trial transcript. The civil service respondents will transmit a copy of that transcript to the Clerk of the Court on or before August 12, 1976.

display was unreliable because of the missing candidates. The state respondents did undertake to provide proof of the job-relatedness of pre-34-944 Sergeant examinations at a future date assuming their legal objections to such proof were overruled (T. 5-6). Compare Petition, p. 6 and opinion of MANSFIELD, C.J., dissenting from the order denying rehearing, pp. 50a-51a.* The district judge did not rule on the state respondents' objection but did state that he preferred to decide the case on the basis of 34-944 alone; that he hoped the plaintiffs would proceed primarily with regard to that examination; that he would subsequently recanvass the situation to see if it was necessary to consider the history or merits of earlier tests; and that he hoped that such consideration would be unnecessary (T. 6-7).

No recanvass of the situation occurred, and no ruling on the need to consider pre-34-944 Sergeant examinations was forthcoming. However, reference to the opinion shows that the district court adjudicated the merits of 34-944 alone. The findings of disparate impact and of lack of job-relatedness are limited to that examination (3a-7a, 9a-15a), and the class of aggrieved individuals is defined in terms of the minorities who took 34-944, not in terms of the minorities who took that examination and one or more prior Sergeant examinations (16a). The sole reference to the impact of pre-34-944 Sergeant examinations is found in the discussion of the job-relatedness of 34-944. The district judge stated (13a-14a):

> "Like the decision to use a written examination and to exclude consideration of supervisory evaluations, determination of the scope and organization of 34-944 seems to have followed the pattern of earlier examinations. Of course, if these set a model for good construction and job-relatedness, that would be a good argument not to depart from their mold. However, while there is evidence in the record of the discriminatory impact of earlier tests, there is no evidence as to their job-relatedness."

The last sentence of the excerpt simply means that in the absence of evidence of the job-relatedness of pre-34-944 examinations, no inference of job-relatedness could be imputed to 34-944 from those examinations.* The reference to the "discriminatory [disparte] impact" of pre-34-944 examinations in the introductory clause is surplusage since the question of disparate impact and the question of job-relatedness are separate issues subject to completely different proof, a point noted by the district judge earlier in his opinion (2a, 7a). Plainly, the reference does not constitute a *finding* of disparate impact resulting from pre-34-944 Sergeant examinations as petitioners would appear to have this Court believe. Petition, p. 6.**

Notwithstanding the fact that 34-944 did not produce any discriminatory effect because no permanent appointments resulted and in the absence of any finding that pre-34-944 Sergeant examinations were discriminatory, the district judge held that a minority quota of Sergeant promotions was an appropriate remedy "to correct the effect of

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* The order denying the petition for rehearing with the dissenting opinions of MANSFIELD and KAUFMAN, C. JJ. is now officially reported at 531 F. 2d 5.

* This limited comment by the district judge is obviously correct. However, petitioners argument that the invalidity of pre-34-944 Sergeant examinations may be retrospectively inferred from the respondents' failure to demonstrate the job-relatedness of 34-944 is incorrect. See Petition, p. 6. The argument was rejected by the Court of Appeals (35a) and is discussed in Point A, *infra*.

** Moreover, under the then prevailing Second Circuit view (e.g. *Chance* v. *Board of Examiners, supra*), a finding of disparate impact would have been meaningless without a further finding that pre-34-944 Sergeant examinations were not job-related. As noted, the district court was foreclosed from the latter finding by the state respondents' initial objections and by the judge's response that he would affirmatively advise the parties if he was going to consider those examinations. See discussion, pp. 7-8, *ante*.

defendants' unconstitutional employment practices'' on plaintiff class (16a). He then ordered a quota of one minority appointment for every three white appointments until all alleged racial imbalance in the Sergeant title was corrected, i.e. until the percentage of minorities in the Sergeant title equalled the percentage of minorities in the Officer title. The quota continued after the adminstration of a demonstrably job-related (''validated'') test and was to be applied for the benefit of any minority candidate regardless of class membership (20a, ¶¶ 4, 5).* The district judge did not specify any ''unconstitutional practices'' other than 34-944 or any ''effect'' in support of the mandate for a minority quota (16a).

As an additional remedial measure, the district court awarded fees to petitioners' attorneys. The award rested on two conclusions of law: attorneys who acted as private attorneys general were entitled to fees notwithstanding the general American rule that prevailing parties are not so entitled and the Eleventh Amendment did not bar the award against the state respondents, all of whom had been sued only in their official capacities (17a-19a).

The Court of Appeals for the Second Circuit reversed the continuing minority quota on two grounds: "insufficient proof'' of past discriminatory practices which the quota was intended to remedy and the inappropriateness of judicial recourse to a remedy which would prefer demonstrably less qualified candidates for civil service promotions solely because of their race. To support its finding of insufficient proof, the Court of Appeals cited the

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* Two quotas were decreed. The first was incident to the "unvalidated" interim procedure, was limited to class members and was affirmed by the Court of Appeals (20a, ¶ 4, 38a-39a). The second was incident to the final "validated" procedure, was not limited to the class and was reversed by the Court of Appeals (20a, ¶ 5, 34a-39a, 41a ¶ 6). Only the second quota is directly in issue before this Court. See discussion p. 2 and first footnote, p. 4, *ante*.

district judge's stated intention to proceed with respect to 34-944 alone, the incomplete and unreliable data for the 1970 Sergeant examination, the absence of any pre-1970 data, and the inadequacy of petitioners' allegations of racial imbalance to prove the disparate impact of pre-34-944 Sergeant examinations without reliable evidence of the number of minority candidates in the Officer title who had been eligible to take such examinations (34a-35a). To support its finding of the inappropriateness of judicial recourse of "remedial" quotas for civil service promotions, the Court cited the reverse discriminatory effect caused by a quota which would displace candidates from a preferred positions on an eligible list because of their race, the state constitutional mandate to promote candidates on the basis of merit alone, Congressional approval of merit system appointments in Title VII, 42 U.S.C. § 2000e-2(h), and the inconsistency between the district court's recourse to a quota and this Court's admonition in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971) that Title VII was not intended "to guarantee a job to every person regardless of qualifications'' (35a-37a). The Court also distinguished its affirmances of quotas in prior cases on the basis of the proof of past discriminatory practices contained in the records of those cases and on the basis of the diffuse impact of the entry level quotas there involved as compared with the impact of the promotional quota on the career opportunities of incumbents who were better qualified and who had committed no wrong (33a-34a, 35a, 37a-38a).

The Court of Appeals reversed the award of attorneys' fees citing *Alyeska Pipeline Service Co.* v. *Wildnerness Society*, 421 U.S. 420 (1975), as controlling and finding no basis upon which to allow a bad faith exception to the American rule (40a, 41a ¶ 7).

Circuit Judge Mansfield's dissent from the Court of Appeals' denial of the petition for rehearing does not consider the grounds cited by the Court of Appeals' panel in reject-

ing alleged pre-34-944 "proof" of discriminatory practices. (49a-51a) and confuses the remedial purpose of making whole actual victims of discrimination with the contrary purpose of preferring minorities solely because of their status absent any showing of discriminatory purpose or effect (51a).

Reasons for Denying the Writ

A. The Court of Appeals was correct in ruling that the proof of pre-34-944 discriminatory practices was insufficient.

Given the district judge's stated intention to proceed with respect to examination no. 34-944 alone and the absence of any findings of discrimination with respect to pre-34-944 Sergeant examinations, the Court of Appeals could have simply vacated the minority quota, intended to remedy past discriminatory practices, as without any foundation. However, the Court of Appeals independently reviewed the evidence before the district court and concluded that it was insufficient to establish any past discriminatory acts attributable to the respondents (34a-35a).

There is no "substantial, unrebutted evidence [in the record] . . . that the under-representation of minorities was brought about by the screening-out effects of the [Sergeant] examinations." Petition, p. 5. As the Court of Appeals observed and as respondents had originally advised the district court, the data provided for the 1970 examination was "incomplete and therefore unreliable" (34a). The 1970 computer display shows that 997 whites, 46 blacks and 1 Hispanic took the examination in issue, and that of this group, only 94 whites passed. In fact, an additional 100 candidates, missing from the display, took the examination. Neither the ethnicity nor the examination scores of the "missing" candidates are

known.* Petitioners did not call any witnesses to attest to the reliability of this incomplete data for the purpose of making passing rate comparisons or to establish the statistical significance (or lack of significance) of such comparisons assuming they could be made, i.e. they failed to make a pre-*Davis prima facie* showing with respect to the 1970 examination. *Commonwealth of Pennsylvania* v. *O'Neill*, 473 F.2d 1029, 1031 (3rd Cir. 1973) (*en banc*). Further, an illustration based on the available 1970 data shows that it is probable that petitioners would have been precluded from a *prima facie* showing had they attempted it: Given the small number of minority candidates shown on the display (46 blacks, 1 Hispanic) and the low passing rate for whites (94 out of 997, or 9.4%), the minority passing percentage would be half the white percentage with the addition of two minority passers from the "missing" group, would not be substantially disparate if there were three "missing" minority passers, and would equal the white percentage if there were four "missing" minority passers. That it was likely that minority candidates who passed the examination were in the "missing" group was attested to by petitioner Kirkland (T. 237).

Petitioners' reference to the two permanent minority supervisors and to the fact that some of their witnesses had failed Sergeant examinations more than once are similarly deficient to prove that alleged minority under-representation in the Sergeant title resulted from pre-39-944 examinations. Petition, pp. 5-6. Again, as the Court of Appeals observed, the allegations of under-representation have "little probative value without statistical background data concerning the eligible correction officer labor pool from which minority supervisors"

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* The computer display of the 1970 examination was compiled on January 1, 1973 and did not include any individual who retired, quit, was terminated, etc. in the intervening three years. These individuals are the missing candidates.

had to be drawn (34a-35a). Thus, absent study of the number of eligibles available in the Correction Officer pool, it cannot be determined whether minority candidates for Sergeant were being "screened-out" by the Sergeant examinations or whether there were simply so few minority candidates eligible to compete that any expectation that they would become supervisors in substantial numbers is unreasonable.* Petitioners offered no evidentiary basis to support the preference for the first inference over the second. Indeed, to the extent that the record provides any evidence on point, that evidence favors the second inference. According to the testimony of petitioners, there were between 51 (Kirkland T. 235) and 75 (Hayes T. 185) minority Correction Officers eligible to take the 1970 Sergeant examination. There were only 25 black Officers eligible to take the 1968 Sergeant examination and approximately 10-15 black Officers eligible to take the 1965 Sergeant examination (T. 234). As of January 1, 1973, there were 318 supervisors (all ranks through Captain) and 4,120 Correction Officers.**

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* Since petitioners withdrew their claims against the Officer examinations (T. 8), they cannot be heard to argue that the "reason" that there were few minority Officers eligible to compete for Sergeant, if that was in fact the case, was the "screening-out" effect of Officer examinations. However, to the extent that this title is considered, again two inferences are equally likely: the Officer examinations had a screening-out effect or few minorities applied for employment in the state Correction Officer series when the majority of prisons to which an employee can be assigned are geographically remote from the metropolitan centers where minorities are concentrated. The record before the district court did establish that there had been a substantial increase in the number of minority Officers during the approximate period between 1961-1973 and that the vast majority of minority candidates in 34-944 were new Officers who just satisfied the time-in-service requirement to compete (T. 38, 154, 238-239, 456).

** The numbers of supervisors and Officers are used as representative of the pre-34-944 period and most favorable to petitioners since they are the largest known complements in a previously less numerous series (T. 52-59).

As is apparent, approximately 75 (or less) minority Correction Officers, or 1.9% of the total Correction Officer complement, were eligible to take the 1970 Sergeant examination or any other preceding first line supervisory examination. Between 1965 and 1970 two blacks passed Sergeant examinations and were appointed; two blacks passed Sergeant examinations and would have been appointed but for irrelevant contingencies;* and one black passed a Sergeant examination but was not reached for appointment prior to the expiration of the list (T. 306-307). Thus, at least four minority officers did or could have obtained permanent appointments prior to 34-944. These four appointments represent 5.3% of the minority officers eligible to become supervisors and 1.3% of the supervisory complement of 318 men. These figures show that there were only a small number of minority candidates eligible to compete for supervisory positions and given that small group, there was no substantial disparity between eligible minority officers, 1.9%, and minority supervisors, 1.3%.

Petitioners' contention that they may retrospectly infer the invalidity of pre-34-944 examinations from the respondents' failure to demonstrate the job-relatedness of 34-944 requires threshold findings that 34-944 was the same as prior examinations in all material respects and that Sergeant job continued to be the same in all material respects. (See Petition, p. 6). The record does not present "substantial" or "unrebutted evidence" in support of such findings (Petition, p. 5), but rather the opposite. As the Court of Appeals stated: "The testimony is undisputed that the duties of a correction sergeant have changed substantially over the years . . ." (35a). The district court

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* One refused appointment, and one was terminated for reasons unrelated to test performance (T. 237).

agreed (13a). Examination no. 34-944 was also different from past examinations. All the test questions on 34-944 were new; some subject areas listed on 34-944 were different from those previously listed, and there was added emphasis on inmate resocialization and rehabilitation (T. 767-769). The statement of the personnel examiner who prepared 34-944 that 34-944 and the 1970 examination were "not the same examination at all" under any professional standard (T. 533) was not refuted by petitioners' expert witness called in rebuttal. Indeed, petitioner Kirkland himself testified that 34-944 was different from past examinations.

From the foregoing description of some of the evidence in fact contained in the record of the proceedings before the district court, it is plain that petitioners' claim that the Court of Appeals held them to an erroneous standard of proof by requiring "complete pass-fail data" is false. Petition, pp. 12-13. The evidence in this case with respect to past discriminatory practices did not present a choice between complete and incomplete but otherwise reliable data from which inferences favorable to petitioners could be drawn. Rather, there was an absence of reliable evidence on this point and to the extent that any inferences could be drawn, those inferences supported the respondents, not the petitioners. In recognizing these deficiencies in petitioners' case, the Court of Appeals opposed no prior ruling. Compare Petition, p. 13 n. 10.

B. The petitioners were afforded complete relief under the district court decree, as modified to delete the continuing minority quota.

The only act which could be claimed to be discriminatory on the record of this case was the administration of examination no. 34-944. By reason of the temporary restraining order, its continuance throughout the proceedings in the

district court and the subsequent issuance of a permanent injunction against the use of 34-944 for any purpose, the examination had no discriminatory effect whatsoever. See discussion pp. 2-3, *ante*. When the Court of Appeals deleted the continuing minority quota, it left intact those provisions of the district court decree mandating the development and administration of a new, demonstrably job-related ("final") selection procedure and such interim procedures as the respondents chose to administer with the approval of the court (20a ¶¶ 3, 3, 31a-33a, 41a ¶ 3, 5). The rulings, in combination, denied candidates on 34-944 the opportunity to be promoted as a result of that discriminatory examination and provided them with a new, substitute opportunity for promotion through the administration of the interim and/or final procedures. To the extent that the candidates were aggrieved in any way by the courts' negative injunctions (or by respondents' acts giving rise to those injunctions), they were made whole by the mandates for new selection procedures without resort to any "remedial" quotas or goals. See *Matter of Board of Education* v. *Nyquist*, 31 N.Y. 2d 468 (1973); *Vulcan Society of the New York City Fire Dep't Inc.* v. *Civil Service Comm'n*, 360 F. Supp. 1265, 1278 (S.D.N.Y. 1973), aff'd 490 F. 2d 387 (2d Cir. 1973). Precluding appointments from the 34-944 eligible list and providing substituted selection procedure in fact accomplished the result which Judge Mansfield found to be preferred over the use of quotas in his dissent from the order denying the petition for rehearing—voiding all promotions made on the basis of a non-job related test (52a)—and that result conformed exactly with the proof in the record. Certainly, nothing in this Court's decisions in *Louisiana* v. *United States*, 380 U.S. 145 (1965), *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, —— U.S. —— 44 U.S.L.W. 4356 (March 24, 1976), weighs against this precise tailoring of relief to demonstrated harm.

Given the insufficiency of the proof of any discriminatory examinations for Sergeant prior to 34-944 and the award of complete relief for any injury resulting from 34-944, it was unnecessary for the Court of Appeals to address the question of whether or not the minority quotas decreed by the district court could be appropriately applied to Sergeant promotions following the administration of a demonstrably job-related examination. However, assuming that question to be properly before this Court, the Court of Appeals was correct in rejecting the use of the quota because of its reverse discriminatory effects and its inconsistency with mandated civil service practices (35a-39a).

The quota decreed by the district court provided preferential promotion rights for any candidate who competed in forthcoming Sergeant examinations merely because of his race (20a ¶ 5). It did not purport to make whole individual victims of discrimination or to put them in the place that would have been but for the administration of a discriminatory examination. Compare *Franks* v. *Bowman Transportation Co., supra; Albermarle Paper Co.* v. *Moody, supra.* Absent this remedial purpose, the quota constituted a racial preference forbidden by the Fourteenth Amendment, *DeFunis* v. *Odeguard,* 416 U.S. 312, 329 (1974) (DOUGLAS, J. DISSENTING), and by Title VII, 42 U.S.C. §§ 2000e-2h, 2000e-2(j).

The fact that the quota was to continue after the administration of a demonstrately job-related civil service promotion examination sharply focuses its illegality. Once the job-related examination was administered, no candidate could claim an opportunity for promotion except on the basis of test score. If that test score is disregarded and minorities extended a preference simply because of race, it is apparent that the purpose of administering a demonstably job-related test is avoided. Further, the state mandates to promote candidates according to merit and fitness demonstrated on competitive examinations are also opposed. N.Y. Constitution Art. V § 6; N.Y. Civil Service Law § 50. To the extent that petitioners would have read Title VII to support of the quota decreed in this action prior to *Washington* v. *Davis, supra,* that reading was opposed by the statute's purpose to provide racially neutral measures of employment qualifications, *Griggs* v. *Duke Power Co., supra,* as well as by its terms, 42 U.S.C. §§ 2000e-2h, 2000e-2(j). In addition, as the Court of Appeals noted, if Title VII and the state civil services practices were found to be inconsistent, there is no present basis for a judicial choice in favor of Title VII since the federal and state statutes are of equal dignity and both serve important social policies (35a-36a).

As the Court of Appeals correctly observed, the fact that the quota operated in a promotional context excerbated its apparent inequity (37a-38a). The white candidate who is foreclosed from promotion must know that he has been passed over in favor of a demonstrably less qualified candidate solely because he is white. The impact on that candidate is of course more severe than were the entry level hiring goals formerly allowed by the Second Circuit, e.g. *Rios* v. *Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *Vulcan Society of New York City Fire Dep't* v. *Civil Service Comm'n, supra.* But see *Equal Employment Opportunity Comm'n* v. *Local 638 . . . Local 28 Sheet Metal Workers' International Association,* 532 F.2d 821 (2d Cir. 1976).

C. The Court of Appeals was correct in ruling that petitioners were not entitled to attorneys' fees.

Petitioners deliberately bypassed their Title VII remedies in the district court but were awarded attorneys' fees under §§ 1981 and 1983 as private attorneys general (1a, 17a-19a). See discussion pp. 4-5, *ante.* The Court of Appeals reversed the award citing *Stolberg* v. *Board of Trustees,* 474 F.2d 485 (2d Cir. 1973), as the law of the Circuit and as precluding the award of fees to prevailing parties,

absent express authorization, except upon a showing of bad faith or obdurate behavior. This Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* substantially affirmed the *Stolberg* rule.

Petitioners now seek to distinguish *Alyeska* on the ground that it was not an employment discrimination case and would find the requisite statutory authorization for the award in 42 U.S.C. § 1988. Both these contentions were put to rest in *Runyon* v. *McCrary,* —— U.S. ——, 44 U.S.L.W. 5034, 5041-5042 (June 25, 1976), wherein this Court held, *inter alia,* that the application of *Alyeska* did not turn on the subject matter of the action but rather on whether the statutes authorizing the action provided expressly for award of fees and that § 1988 did not so provide.

CONCLUSION

The Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Second Circuit should be denied.

August 3, 1976

Respectfully submitted,

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Appendix A, Memorandum.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 1548

MEMORANDUM

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants,

and

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Defendants.

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LASKER, D.J.

On July 31, 1974, a post-trial decree was entered in this case ordering the defendants to develop a lawful non-discriminatory selection procedure for the position of Correction Sergeant. The order contemplated the development of a new written examination and selection procedure to replace Examination No. 34-944 which, after trial, had been declared invalid as violating the Constitution of the United States.

Paragraph 4 of the decree specified that during the period of development of the new procedure for permanent appointments the court would entertain requests by the defendants to make permanent appointments under an

interim procedure subject to specified conditions. Pursuant to the provisions of the decree, the defendant Civil Service Commission has developed both proposed permanent and interim plans.

On October 23, 1975, plaintiffs moved for an order supplementing the decree of July 31, directing the defendants permanently to appoint to the position of Correction Sergeant the named plaintiffs and all members of their class who had been serving as provisional appointees in that position for a period of six months or longer. On November 3, 1975 Intervenors-Defendants moved for a similar order to appoint the named Intervenors-Defendants. Both motions asserted that further delay in implementing the procedures of making permanent appointments and continuance of provisional appointments would be harmful to the moving parties and contrary to the spirit of the court's earlier orders.

To understand the significance of these motions it should be noted that since the inception of this litigation on April 10, 1973, and the granting of a temporary restraining order shortly thereafter, no permanent appointment to the position of Correction Sergeant has been made. As a result a very substantial number of persons has been serving in that position on a provisional basis for up to nearly three years. The uncertainty bred by the indefiniteness of the status of such persons is self-evident and is unsatisfactory to all parties: the plaintiff Black-Hispanic class, the Intervenors-Defendants, who are correctional personnel not Black or Hispanic, and the defendants Department of Civil Service and Department of Correctional Services. The situation has been unavoidably intensified by the necessity, during the fifteen month period since July 31, 1974, of authorizing further provisional appointments of Correction Sergeants (pursuant to a supplemental order and decree of September 19, 1974) pending

the implementation of a procedure for permanent appointments, whether interim or final.

Argument of the motions was heard on December 3, 1975. Samuel J. Taylor, Chief Personnel Examiner, and Grace Wright, Director of Validation Program of the Department of Civil Service, opposed the motions and urged the court to take no action to make permanent appointments except on the basis of the permanent procedure in process of development. On the other hand, Lewis Douglass, Executive Deputy Commissioner of the Department of Correctional Services urged that the court approve the proposed interim procedure developed by the Civil Service Commission and that it be administered to a "field" of the persons who originally participated in Examination 34-944. The Commissioner stressed the urgent need of the Department for an eligibility list from which appointments could be made on a permanent basis and the problems of morale festering among the substantial number of men who had been serving on a provisional basis for so long a period. He expressed his conviction that the interim procedure could be implemented to produce such an eligibility list in substantially less time than the proposed permanent plan. Both counsel for the plaintiffs and the intervening defendants then advised the court that if the court approved the administration of the interim procedure to a field of those persons who originally took Examination 34-944, they would no longer press the motions referred to above.

Recognizing the desirability of making all future permanent appointments on the basis of a permanent procedure which could be adequately validated, the court instructed the parties to set forth in writing their respective views as to how much longer it would take to effectuate the permanent procedure rather than the interim plan. Voluminous correspondence has ensued, unhappily without substantial illumination, a result which perhaps should have been anticipated in view of the murky state of the art of testing and the numerous intangibles which make accurate prediction of time lags difficult, if not impossible.

After studious review of the material submitted in connection with both the proposed permanent and interim procedures, as well as the detailed argumentative correspondence of all the parties relating to the merits of the procedures and the estimated times for effectuation of the respective plans, I have concluded that the proposed interim procedure should be administered to a field of those still in New York State employment, who originally participated in the Civil Service Correction Sergeant Promotion Examination 34-944. I have reached this conclusion with some regret since I recognize the desirability of making permanent appointments only on the basis of a permanent plan. I have done so nevertheless for the following reasons:

1. The period of time which has passed since the inception of this litigation in April, 1973. For that long period a large number of men have been serving as Correction Sergeants on a provisional basis without knowing where they stand as to the future, unsure whether they should move their families to new locations or, if they have already done so, whether they will be required to uproot themselves should their provisional appointments be undone. They are entitled to the normal stability of permanent status. Moreover the very delay which has occurred to date suggests that the inherent complexity of the selection procedure in this field may require further substantial passage of time until it is completed.

2. There are serious unresolved questions as to how much longer it will take to effectuate the permanent plan than the interim plan. While the Civil Service Commis-

sion's letter of December 24, 1975, makes some persuasive answers to the strong assertions of plaintiffs' attorney and expert in their letters of December 15 and 16 on this point, the unresolved disputed facts—or conclusions to be drawn from agreed facts—remain too significant to disregard. The correspondence clarifies and focuses the issue but does not permit a conclusive determination by the court. In such circumstances of doubt where other factors of morale and need are clearcut, action is preferable to inaction.

3. Three of the four parties, including the defendant Department of Correctional Services which actually employs all the persons affected by this litigation, have jointly requested that the interim plan be effectuated. Only the Department of Civil Service opposes.

4. It is time that the morale of the service be considered. The situation here is strikingly close to that with which Judge Mansfield dealt in *Chance* v. *Board of Education of City of New York*. There he agreed that "[t]he ideal solution would be the immediate establishment of a new permanent appointment system" but observed that "such a system, which requires a careful study and analysis of numerous complex factors bearing on job relatedness, fairness and evaluation of performance, cannot be built in a period of days or even of weeks" and that the necessary passage of time caused morale problems. (Quoted at 496 F.2d 823) He therefore allowed permanent appointments on the basis of an interim plan. The Court of Appeals affirmed, 496 F.2d 820, 825 (2d Cir. 1974).

For these reasons the earlier orders of the court shall be supplemented to provide that the interim procedure proposed by the Civil Service Commission shall be administered as promptly as possible to a field of those still in

the employ of New York State who originally participated in the Civil Service Correctional Sergeant Promotion Examination 34-944. Plaintiffs' motion of October 23, 1975 and Intervening-Defendants' motion of November 3, 1975 are regarded as withdrawn and shall be marked accordingly.

Submit order on notice.

Dated: New York, New York
January 26, 1976.

MORRIS E. LASKER
U.S.D.J.

Appendix B, Order.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

This Court having on August 3, 1975 directed defendants to submit an interim selection procedure for the position of Correction Sergeant on or before August 27, 1975; and defendants having undertaken to submit a final selection procedure for the position of Correction Sergeant (Male) pursuant to the Order and Decree, dated July 31, 1974, paragraph 3, on or before that date; and both interim and final selection procedures having been timely submitted; and plaintiffs having moved on October 23, 1975, for an order directing the permanent appointment of the named plaintiffs and all members of the class who had been serving as provisional Correction Sergeants for at least six months; and the intervenors-defendants having moved on November 3, 1975 for an order directing the permanent appointment of said intervenors-defendants and all non-class members who had been serving as provisional Correctional Sergeants for at least six months; and the Court having heard argument, at which counsel for the plaintiffs and for the intervenors agreed respectively to withdraw their motions on certain conditions, and the plaintiffs, intervenors and defendant Commissioner of Correction having requested the Court to order implementation of the interim selection procedure; after due deliberation and upon the memorandum opinion dated January 26, 1976; it is

ORDERED that the motions of plaintiffs and intervenors-defendants are deemed withdrawn; and it is further

Appendix B, Order.

ORDERED that defendants administer the interim selection procedure as promptly as practicable; and it is further

ORDERED that the aforesaid interim selection procedure be administered to the field of candidates who took examination no. 34-944, who remain in the employ of New York State on the date the interim procedure is administered and who file timely applications as specified by the Department of Civil Service; and it is further

ORDERED that after the administration of said interim selection procedure, the defendants shall as soon as practicable establish a ranked list of those persons who are eligible for appointment on the basis of their scores on said interim selection procedure; and it is further

ORDERED that defendant Department of Correctional Services shall after the establishment of said ranked list immediately make permanent appointments from said list to fill all positions which are not held by either permanently appointed Sergeants or provisionally appointed Sergeants who obtained their provisional appointments as a result of reclassification until such time as the defendant Department of Civil Service shall establish an eligible list based on the final selection procedure as approved by the court. Of the persons appointed to fill such positions from the interim list at least ¼ shall be members of the plaintiffs' class until the percentage of Correction Sergeants who are black or Hispanic is equal to the percentage of black or Hispanic Correction Officers serving by permanent appointment as of the date [of] the administration of 34-944; and it is further

ORDERED that the seniority of any Correction Sergeant appointed from the interim list who was previously pro-

visionally appointed on or before the date of the Temporary Restraining Order entered herein and who has continuously served until his appointment from the interim list shall be determined from the date of said temporary restraining order and the seniority of any Correction Sergeant appointed from the interim list who was previously provisionally appointed from the 34-944 eligible list and who has continuously served until his appointment from the interim list shall be determined from the date of said individual's provisional appointment.

Dated: New York, New York
April 19, 1976

MORRIS E. LASKER
U.S.D.J.